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No. 93-30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DAVID A. HAMMOND, et al., on his own behalf and on behalf of all individuals similarly situated,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and TRANS WORLD AIRLINES, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF TRANS WORLD AIRLINES, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioners are a group of airline pilots who are unhappy with several collective bargaining agreements which their union leadership negotiated and which they ratified by a 96% vote. After ratification, they filed suit against their union and their employer, claiming that the union breached its duty of fair representation in the negotiations and that the employer violated a contract and the Railway Labor Act by applying economic pressure during collective bargaining.

The Court of Appeals concluded that Petitioners were bound by the negotiated and ratified agreements and that the economic pressure which was applied was a normal part of collective bargaining. Those holdings are consistent with well-established principles of labor law and decisions by other courts of appeals. Indeed, Petitioners cite no decision rendered by this Court or by another court of appeals with which the Seventh Circuit decision conflicts. Accordingly, the petition presents no issue requiring review by this Court and should be denied.

COUNTER-STATEMENT OF THE CASE

In early 1986, Respondent Trans World Airlines, Inc. ("TWA") announced that it would acquire Ozark Airlines, Inc. ("Ozark"). After the announcement, the pilots employed by Ozark and TWA, through their duly elected collective bargaining representatives, engaged in negotiations with each other regarding an integrated pilot seniority list.[1] As is frequently the case in such negotiations, the interests of the bargaining parties differed markedly (App. 43).[2] The TWA pilots sought an integration solely by the pilots' dates-of-hire because such an integration maximized the seniority position of the generally more senior TWA pilot workforce. The Ozark pilots objected to a pure date-of-hire integration because they were on average a more

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[1] Both pilot groups were represented by Respondent Air Line Pilots Association ("ALPA"). However, each pilot group was represented separately through an ALPA Master Executive Council ("MEC"), elected by that airline's pilot group. Thus, the TWA pilots were represented by the TWA MEC and the Ozark pilots were represented by the Ozark MEC.

[2] References to Petitioners' Appendix will be designated as "(App. ____)."

junior workforce and a date-of-hire integration would place many of them at the lower end of the seniority list. Consequently, the Ozark pilots proposed a combined date-of-hire and ratio type of integration (*i.e.*, an Ozark pilot would be slotted after a certain number of TWA pilots, regardless of date-of-hire), the method of integration which they believed would enhance the seniority position of the Ozark pilots.

One issue affecting the pilots' negotiations throughout the summer and fall of 1986 was the applicability of ALPA Merger Policy to the Ozark-TWA merger (App. 43).[3] In August, 1985 and January, 1986, before TWA acquired Ozark, the TWA pilots had entered into agreements with financier Carl Icahn and TWA to induce Icahn to acquire TWA. At the time, the TWA pilots wanted Icahn to acquire TWA to thwart Frank Lorenzo's attempt to acquire the airline. In these agreements, the TWA pilots had granted substantial wage and benefit concessions to Icahn and TWA. In exchange for those concessions, Icahn and TWA had agreed to provide the TWA pilots with certain

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[3] Under ALPA Merger Policy (App. 57-89), an arbitrator decides the method of proposed integration if the pilot groups are unable to reach an agreement. However, two important points are overlooked by Petitioners in connection with their situation in 1986. *First*, even if their disagreement with the TWA pilots was submitted to arbitration, an arbitrator could have adopted the TWA pilots' proposed integration. Thus, application of ALPA Merger Policy would not have guaranteed a better result for the Ozark pilots than the result ultimately obtained through negotiations. *Second*, whatever integration the arbitrator might have rendered was not binding on TWA, which would not be a party to this intra-union proceeding. Instead, the arbitrator's proposed integration would have had to be submitted to TWA for its acceptance. Thus, even if ALPA Merger Policy produced an integrated list through arbitration, TWA was free to reject it (App. 17) (in the words of the Court of Appeals, "ALPA's 'merger policy' could not compel TWA to agree to anything.").

rights in the event that TWA acquired or was acquired by another carrier in the future. Specifically, section 10 of one agreement (referred to as the "Wraparound Agreement") provided:

> The Icahn Group and ALPA further agree that if TWA, New TWA or the Icahn Group acquires "control" of a company . . . which company owns or operates another airline . . . , then:
>
> (a) for the period through December 31, 1988 . . .
>
> (i) the Icahn Group shall cause such airline to be operated as or by a separate wholly-owned subsidiary or separate operating division of TWA or New TWA,
>
> (ii) there will be no full or partial merger undertaken of the pilot seniority lists of the airline operated by TWA or New TWA ("TWA Airline") and such other airline ("Acquired Airline") without prior consent of ALPA,
>
> (iii) the fleet size of the TWA Airline as it existed immediately prior to such acquisition shall not be reduced by TWA or New TWA except to the extent airplanes can be sold or otherwise disposed of pursuant to Section 7 of the [August 5, 1985] Agreement,
>
> (iv) any exchange of airplanes between the TWA Airline and the Acquired Airline shall not be permitted to result in a substantial adverse impact on the group of pilots protected under the provisions of Letter of Agreement XIX between ALPA and TWA ("LOA #19") [a furlough protection agreement] because of changes in the makeup of the TWA Airline fleet,
>
> (v) if the annualized level of block hours of flying of the TWA Airline is reduced below 469,000 hours as a result of acquiring such other airline and the monthly credit/pay cap for TWA Airline pilots is lowered to 65 hours as provided

> in LOA #19, there shall be no furlough of Pilots protected under LOA #19 provided, however, that this shall not affect the application of LOA #19 in other circumstances . . . .

(App. 47-48).

During their negotiations with the Ozark pilots, the TWA pilots asserted that they—not ALPA President Henry Duffy or any other pilot group—possessed the "consent" power contained in section 10(a)(ii) of the Wraparound Agreement and, therefore, that ALPA Merger Policy did not apply to the Ozark-TWA merger. On the other side of the bargaining table, even though the TWA pilots were the only pilots who negotiated and were affected by the concessions given in the Wraparound, the Ozark pilots asserted that the "consent" power belonged to ALPA President Duffy (and not to the TWA pilots) and that ALPA Merger Policy applied to the Ozark-TWA merger.[4] TWA and Icahn—parties to the Wraparound—asserted that they granted the "consent" power to the TWA pilots in exchange for their wage and benefit concessions.[5]

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[4] In the lower courts, Petitioners asserted a claim against TWA for breach of the Wraparound Agreement. Concluding that the Wraparound gave rights only to the TWA pilots, the District Court stated that "[t]he Ozark pilots were therefore neither parties to nor third party beneficiaries of the wraparound agreement" (App. 48). The Court of Appeals found it unnecessary to decide this question (App. 18).

[5] Before the TWA pilots successfully negotiated certain protections for themselves in the event that TWA acquired or was acquired by another airline, the Ozark pilots had attempted, but failed, to negotiate similar protections into their pre-merger collective bargaining agreement with Ozark (O'Toole Dep. 355). Thus, their criticism of the TWA pilots' position regarding the Wraparound is nothing but a hypocritical by-product of their failure to achieve the same benefit achieved by the TWA pilots.

While the two pilot groups were negotiating over an integrated seniority list but making no progress, TWA made several business decisions during the fall of 1986 which affected the Ozark pilots, but which were allowed under the applicable collective bargaining agreements (App. 50). Four Ozark aircraft were transferred to the TWA fleet, 86 Ozark pilots were furloughed (*i.e.*, laid off) as a result of the aircraft transfer, the Ozark pilots' pension plan was terminated, and the Ozark-ALPA collective bargaining agreement was terminated with the TWA-ALPA collective bargaining agreement then being applied to the Ozark pilots.

In response to these actions, the Ozark pilots, with advice from their separately retained legal counsel, considered instituting various legal actions (*i.e.*, grievances, lawsuits, etc.) against Ozark and TWA. However, other than a single grievance challenging the termination of their pension plan—a grievance which was processed and settled by a new, negotiated pension plan—the Ozark pilots never initiated any legal action against Ozark or TWA.

The reason the Ozark pilots initiated no legal action is simple and uncontested in the record. The Ozark MEC concluded, with the advice of its legal counsel, that the Ozark pilots would lose any legal action they initiated challenging any of TWA's actions. Specifically, the Ozark MEC concluded that any claim relating to the termination of the Ozark-ALPA collective bargaining agreement was a "loser" (TWA Fact 92),[6] any claim relying on the successor clause in the Ozark-ALPA collective bargain-

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[6] Citations to "TWA Fact ____" refer to TWA's Statement of Material Facts as to Which There Is No Genuine Issue filed in support of its motion for summary judgment. Such facts cited in this brief were uncontested by Petitioners.

ing agreement did not have "much chance of success" (TWA Fact 108), any claim relating to the aircraft transfer had "little chance, if any, of success" (TWA Fact 108), and the chance of winning any claim relating to the termination of the Ozark pilots' pension plan was "very poor" (O'Toole Dep. 487-88). As Ozark MEC Chairman Michael O'Toole candidly summarized the situation for his pilot group: "[O]ur position was weak in virtually all areas" (TWA Fact 108).

As a result, the Ozark pilots decided to negotiate the best deal they could rather than to litigate and risk worsening their already "weak" positions (App. 39) ("It was the weakness of [the Ozark pilots'] bargaining position rather than any improper conduct by defendants that resulted in the Ozark pilots' large vote of approval."). Consequently, in December, 1986, the Ozark pilots returned to the bargaining table and negotiated the best agreements they could with the TWA pilots and TWA. Those agreements set forth the terms governing "the integration of the [Ozark pilots] into the TWA-ALPA agreement," resolved "all disputes regarding the terms and conditions of employment for the Ozark pilots," and called for the withdrawal of "[a]ll grievances, lawsuits and [Department of Transportation] complaints filed or initiated by the former Ozark pilots involving the merger of TWA and Ozark" (TWA Ex. 27 at p. A7615; TWA Facts 104, 111).

The negotiated agreements were not secretly agreed to by the Ozark MEC or forced upon the Ozark pilots by their MEC. Instead, the Ozark MEC and its attorneys held meetings with the Ozark pilots to explain the terms of the agreements, to discuss the benefits and disadvantages of the agreements, and to "allow the Ozark pilots to express their opinion[s] on whether or not to accept the agreement[s] under the conditions that existed at that

time" (O'Toole Dep. 215). In written materials provided to the Ozark pilots before a ratification vote was held, the Ozark MEC stated:

> The MEC and the Merger Committee recommend that you approve these agreements. We do so because we are convinced that the agreements are in the best interests of the Ozark pilots.

(ALPA Ex. 28). By an overwhelming margin (96%), the Ozark pilots ratified the agreements. As the District Court concluded, "[t]hat overwhelming ratification was not the result of any violation of the Ozark pilots' rights . . . but rather a rational decision that the Ozark pilots were better off ratifying the agreement than they would be taking their chances on an uncertain lawsuit during which many if not all of them might be out of work" (App. 50).

REASONS FOR DENYING THE WRIT

There are at least three reasons why certiorari should be denied as to TWA. *First*, almost the entire thrust of the petition relates to Petitioners' fair representation claim against ALPA. Indeed, just over one page of the petition is directed to TWA (pp. 25-27), and the statement of questions presented lists no issue directed to TWA. Because the petition does not raise a serious issue regarding TWA's conduct, it should be denied.

Second, Petitioners' principal argument supporting review with respect to TWA is that, in the event the Court concludes that ALPA breached its duty of fair representation, the lower courts should be directed to decide whether TWA participated in and facilitated ALPA's breach. As we show in Section II below, however, the undisputed record establishes that TWA did not participate in or facilitate ALPA's alleged breach (*i.e.*, its failure to implement

ALPA Merger Policy when the Ozark pilots wanted it implemented). Thus, such a remand would be pointless.

Third, Petitioners ask this Court to review the Court of Appeals' holdings that the Ozark pilots are bound by their ratification of the merger agreements and that TWA's exercise of economic power was lawful. In challenging these holdings, however, Petitioners do not explain why they merit review under this Court's standards for review. Petitioners identify no conflict among the circuits and offer no explanation as to why the Court of Appeals' holdings involve some important labor law question. The dispositive fact is that, in reaching these holdings, the Court of Appeals applied established principles of labor law under the Railway Labor Act ("RLA"), which governs labor relations of airlines, and other federal labor laws. Furthermore, the Court of Appeals' decision is fully consistent with the decisions of this Court, and does not conflict with decisions by other circuits. Indeed, Petitioners cite no case decided by this Court or by another court of appeals with which the Court of Appeals' decision conflicts. Therefore, the petition should be denied.

I.

The Court Of Appeals Correctly Concluded That The Collectively Bargained Agreements Ratified By 96% Of The Ozark Pilots Bar Their Claims Against TWA.

Petitioners do not and cannot genuinely contest that the collectively bargained agreements ratified by 96% of the Ozark pilots bar this lawsuit. Instead, they argue that the agreements should be voided because they were the product of "unlawful duress" (Pet. 26).

Petitioners' argument is fatally flawed in two respects. First, it is conspicuous that, throughout the lower court proceedings and before this Court, Petitioners have con-

tended that TWA's actions and proposed actions were "illegal." But at the time of the actions, the Ozark pilots' union leadership, with the advice of numerous experienced labor law attorneys, concluded otherwise. For example, Petitioners protest TWA's decision to terminate the Ozark-ALPA collective bargaining agreement and to apply the TWA-ALPA collective bargaining agreement to the Ozark pilots. At the time of that action, however, the Ozark pilots concluded—with the advice of their attorneys—that a legal attack against it was a "loser" (TWA Fact 92).[7] The Ozark pilots and their attorneys reached the same conclusion for all the other claims they contemplated filing. Thus, Petitioners are disingenuous in now asserting that certain actions taken by TWA seven years ago were unlawful when, at the time and in a position to mount a legal challenge to those actions,[8] they decided not to do

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[7] The reason such a claim was a "loser" is that under National Mediation Board decisions in effect in October, 1986, certifications held by unions on an acquired carrier like Ozark were automatically extinguished by "operation of law" when the carriers merged operations. *Republic Airlines, Inc.*, 8 N.M.B. 49 (1980). Consequently, any pre-merger collective bargaining agreements covering the acquired airline's employees (in this case the Ozark-ALPA collective bargaining agreement) also were automatically extinguished. *Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 163 (5th Cir. 1983). Thus, the Ozark pilots knew that attacking TWA's action would fail as a matter of law.

[8] The uncontested record establishes that as late as December 8, 1986—just several days before the final agreements were successfully negotiated—the Ozark pilots and their attorneys discussed possible grievances and other legal actions (TWA Facts 88, 91-93). In fact, draft grievances had been prepared and were ready for filing (TWA Fact 88). But the Ozark pilots decided not to pursue such action:

> During the course of the December 5th meeting . . . various courses of action were discussed. It was the expressed opinion of the ALPA people and [legal counsel] present that we

(Footnote continued on following page)

so because they and their attorneys concluded that a court, arbitrator, or administrative agency would find those actions to be lawful.[9]

Second, Petitioners' arguments relating to the legality of TWA's actions simply are red herrings. To debate whether TWA's actions and proposed actions were legal or illegal is to miss the crux of this case and to ignore the fundamental correctness of the Court of Appeals' and District Court's decisions. No court has overturned a collectively bargained agreement resolving a labor dispute because of allegedly "illegal threats" or "coercion" during negotiations. Nothing in the RLA, or in the federal labor laws generally, allows a party to strike its best deal to settle a labor dispute, and then reap the benefits of the agreement while it litigates to try to gain more by arguing that the deal had to be made because of the superior bargaining strength of the other party. To the contrary, the well-settled law under the RLA is that the process of labor negotiations is fundamentally one of "compromise and economic pressure." *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1281 (7th Cir. 1985) (*quoting NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 (1981)). *See also Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 682 F. Supp. 1003, 1026 (W.D. Mo. 1988), *aff'd*, 878 F.2d 254 (8th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990).

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[8] *continued*

> had not a very good chance of succeeding in most of the litigation that we were contemplating . . . and that we were probaly better served or our people were better served by accepting what deal we could get.

(O'Toole Dep. 506-07).

[9] The District Court (App. 50) and the Court of Appeals (App. 17) likewise concluded that TWA did not violate any contractual or other legal obligation through its various actions and proposed actions.

Indeed, federal courts uniformly have held that economic coercion or threats of same made during the course of collective bargaining are not unlawful and cannot serve to vitiate a collectively bargained agreement. *Herring v. Delta Air Lines, Inc.*, No. CV87-5725-RJK (C.D. Cal. 1988) ("Because the collective bargaining process necessarily contemplates both the use and threatened use of economic weapons, the courts have refused to rescind labor contracts which might otherwise be considered coercive outside the context of labor negotiations."), *aff'd*, 894 F.2d 1020 (9th Cir.), *cert. denied*, 494 U.S. 1016 (1990); *ALPA v. Eastern Air Lines, Inc.*, 863 F.2d 891, 909 (D.C. Cir. 1988); *Parker v. Connors Steel*, 855 F.2d 1510, 1520 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989); *Local No. 547, UAW v. NLRB*, 765 F.2d 175, 183-84 (D.C. Cir. 1985); *Line Drivers Local No. 961 v. W.J. Digby, Inc.*, 218 F. Supp. 519 (D. Colo. 1963), *aff'd*, 341 F.2d 1016 (10th Cir. 1965).[10] The Court of Appeals' decision is consistent with this settled authority:

> Straightened circumstances these were, but a decision to make the best of a poor position does not vitiate a choice. [citation omitted]. . . . TWA had every right to use economic pressure. To treat the pilots' response as voidable, making their vote a one-way street in which they could reap any benefit but would surrender nothing, would ensure that employers paid no heed to unions' promises in the future. A group disabled from making binding concessions can-

[10] The Ozark pilots themselves recognized and took advantage of this legal principle. Following execution of the agreements resolving all of the outstanding disputes, Ozark MEC Chairman O'Toole stated that the Ozark pilots' threat to file litigation might have pressured TWA to move off of its position, and that "[b]oth sides used whatever pressure was available to them" (TWA Fact 106).

> not expect anything in return. One of the principal objectives of labor law is peaceful, which is to say contractual, resolution of differences. When one side may abandon its promises by pleading hard circumstances, the institution of contract and all its benefits are imperiled.

(App. 18). The District Court reached the same conclusion (App. 50) ("Rough as it may be, the sort of economic pressure applied by TWA is common in labor disputes and is not of itself unlawful.").

The simple principle of this case, which the Court of Appeals correctly recognized and enforced, is that if the Ozark pilots believed that TWA had violated a collective bargaining agreement or the RLA, they should have challenged those actions immediately and directly through a grievance, lawsuit, or National Mediation Board proceeding. They did not have the right, however, to cut the best deal they could with whatever economic or legal leverage they possessed,[11] accept the benefits of those negotiated

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[11] Petitioners placed and continue to place great reliance on the fact that the Wraparound Agreement granted the consent power over a merged seniority list to "ALPA," which in their view only could mean ALPA National through the person of ALPA President Duffy. That certainly was an argument the Ozark pilots could have made and did make. However, they must acknowledge—as their attorneys did at the time—that there are compelling arguments that the Wraparound's "consent" power belonged to the TWA pilots. In particular, the intent of the parties who actually sat at the bargaining table and negotiated the Wraparound—Icahn, TWA and TWA MEC Chairman Harry Hoglander—was to provide benefits only to the TWA pilots and nobody else (TWA Facts 36, 40; Hoglander 01/25/89 Dep. 95). Thus, regardless of what the Ozark pilots or President Duffy thought regarding who possessed the "consent" power, this evidence could have crushed the Ozark pilots' argument. Because of the prospect that they would lose if they pushed the issue to litigation, the Ozark pilots rationally concluded that negotiation was the more prudent course of action.

agreements after they were put in place (*i.e.*, guaranteed captain and first officer positions for three years, even though by virtue of their seniority many of the Ozark pilots would not have been able to hold such positions),[12] and then turn around and file a lawsuit seeking to obtain greater benefits than the agreements provided to them.

Under the RLA, the Ozark pilots could have either litigated or negotiated a final resolution of their claims—but not both. By choosing a negotiated agreement, Petitioners are bound by that resolution. The Court of Appeals' decision correctly recognizes that Petitioners' position conflicts with the RLA's requirement that parties "make and maintain agreements" (45 U.S.C. § 152 First), is inconsistent with the RLA's stated public policy encouraging parties to settle all disputes (*Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969)), jeopardizes the enforceability and validity of countless collective bargaining agreements which followed a party's (the employer, the union, or both) exercise of economic pressure during negotiations, and has been rejected by every court which has addressed similar arguments.[13] Accordingly, the Court of Appeals' decision is correct and does not require review by this Court.

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[12] It is significant that Petitioners did not seek to enjoin the merger agreements in this proceeding until November, 1989—three years after the agreements were reached and just before Petitioners' guaranteed status in the cockpit under the agreements was to expire. Their motion for injunctive relief was denied.

[13] At page 27 of their petition, Petitioners cite four cases which purportedly support their position that a court has the power to void the agreement ratified by the Ozark pilots because of the allegedly unlawful economic pressure applied by TWA. Interestingly, none of these cases was relied upon by Petitioners before the Court of Appeals. Moreover, none of the cases even remotely sup-

(Footnote continued on following page)

II.

TWA Remains Entitled To Judgment On The Fair Representation Claim, Regardless Of The Disposition Of The Claim Against ALPA.

As discussed previously, the thrust of the petition challenges the Court of Appeals' decision that ALPA did not breach its duty of fair representation. TWA agrees with the Court of Appeals' decision that ALPA did not breach its duty of fair representation.[14] Consequently, Petitioners' fair representation claim automatically fails as to TWA. However, even if ALPA is found to have breached its duty, the judgment in favor of TWA remains proper and should be left undisturbed.

In order to hold TWA liable with ALPA for ALPA's breach of its duty of fair representation, Petitioners must

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[13] *continued*
ports this proposition. For example, in *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747 (3d Cir. 1977), the court invalidated a collective bargaining agreement because the agreement had not been ratified by the membership, which was a requirement under the union's constitution—a requirement that the employer knew of. The case had nothing to do with economic pressure during collective bargaining negotiations and a conscious decision ratified by the membership of the bargaining unit to reach a collectively bargained agreement rather than to litigate. Similarly, Petitioners cite *Union Pacific Railroad Co. v. Public Service Commission of Missouri*, 248 U.S. 67 (1918). This case, however, did not even arise in an employer-employee context, let alone in the context of collective bargaining.

[14] It is noteworthy that, although the Court of Appeals joined this case with *Rakestraw v. ALPA, petition for cert. filed*, 61 U.S.L.W. 3790 (U.S. May 11, 1993) (No. 92-1798) for purposes of stating the general principles of fair representation law, the two cases are dramatically different in terms of the factual record relating to ALPA's alleged breach of its duty of fair representation. Regardless of what disposition this Court may make in *Rakestraw*, the petition here should be denied.

prove that TWA acted in collusion with ALPA. *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1283 (7th Cir. 1985). The alleged breach in this case centers upon ALPA President Duffy's failure to implement ALPA Merger Policy when the Ozark pilots demanded that it be implemented. The decisions whether to implement and when to implement ALPA Merger Policy belonged to and were made exclusively by Duffy and the ALPA Executive Committee. There is not a shred of evidence in the record that TWA colluded with Duffy or the Executive Committee in their decisions to delay implementation of ALPA Merger Policy (or in any of their decisions affecting the Ozark pilots). Thus, even if the Court of Appeals erred in its fair representation finding with respect to ALPA, that would have no effect on TWA's entitlement to judgment on Petitioners' fair representation claim.

CONCLUSION

The petition for writ of certiorari should be denied.

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